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Supreme Court, U.S.
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No. 04-1130

# In The Supreme Court of the United States

THOMAS SHARPE, M.D.,

*Petitioner,*

v.

CHARLES P. CONNOLE, ROBERT LEADER, MIKE LAWLER, VIRGILIO RIGOR, M.D., DONALD SCHUESSLER, M.D., JANUSZ MROZ M.D., STEVE BURKHART, M.D., SUNY SYRACUSE HEALTH SCIENCE CENTER, NYS DEPARTMENT OF HEALTH, BARBARA DEBUENO, M.D., COMMISSIONER, MARTHA ELLEN, WATERTOWN DAILY TIMES, VIJAY KUMAR, M.D., AND JUDITH J. CHOATE, ADMINISTRATRIX OF THE ESTATE OF JOHN W. CHOATE,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## BRIEF OF RESPONDENTS JOHNSON NEWSPAPER CORPORATION AND MARTHA ELLEN IN OPPOSITION

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## COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did Appellant have standing to sue the Johnson Newspaper Corporation and its reporter Martha Ellen for allegedly violating 18 U.S.C. § 248 in the course of their newsgathering activities involving interviewing women who sought reproductive care after closure of the only area hospital maternity ward in Ogdensburg, New York following a New York State Health Department investigation triggered by charges made against Appellant?

2. Did the District Court properly grant summary judgment to the Johnson Newspaper Corporation and Martha Ellen?

## CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, S. Paul Battaglia and Bond Schoeneck & King PLLC state that the "Watertown Daily Times" is the trade name of a newspaper of general circulation published daily and distributed by the Johnson Newspaper Corporation, a privately held New York Corporation, throughout northern New York State. None of the shares of the Johnson Newspaper Corporation is held by a publicly traded company.

Pursuant to Supreme Court Rule 29.6, S. Paul Battaglia and Bond Schoeneck & King PLLC state that "SUNY Syracuse Health Science Center" is a publicly owned hospital created by Article 8 of the Education Law of New York State, and operated by the State University of New York.

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# RELEVANT STATUTES AND REGULATIONS

## UNITED STATES CODE ANNOTATED
## TITLE 18. CRIMES AND CRIMINAL PROCEDURE
## CHAPTER 13 – CIVIL RIGHTS

### § 248. Freedom of access to clinic entrances [hereafter "FACE"]

**(a) Prohibited activities. – Whoever –**

**(1)** by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services;

**(2)** by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person lawfully exercising or seeking to exercise the First Amendment right of religious freedom at a place of religious worship; or

**(3)** intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages or destroys the property of a place of religious worship, shall be subject to the penalties provided in subsection (b) and the civil remedies provided in subsection (c), except that a parent or legal guardian of a minor shall not be subject to any penalties or civil remedies under this section for such activities insofar as they are directed exclusively at that minor.

**(b) Penalties.** – Whoever violates this section shall –

**(1)** in the case of a first offense, be fined in accordance with this title, or imprisoned not more than one year, or both; and

**(2)** in the case of a second or subsequent offense after a prior conviction under this section, be fined in accordance with this title, or imprisoned not more than 3 years, or both; except that for an offense involving exclusively a nonviolent physical obstruction, the fine shall be not more than $10,000 and the length of imprisonment shall be not more than six months, or both, for the first offense; and the fine shall, notwithstanding section 3571, be not more than $25,000 and the length of imprisonment shall be not more than 18 months, or both, for a subsequent offense; and except that if bodily injury results, the length of imprisonment shall be not more than 10 years, and if death results, it shall be for any term of years or for life.

**(c) Civil remedies.** –

**(1) Right of action.** –

**(A) In general.** – Any person aggrieved by reason of the conduct prohibited by subsection (a) may commence a civil action for the relief set forth in subparagraph (B), except that such an action may be brought under subsection (a)(1) only by a person involved in providing or seeking to provide, or obtaining or seeking to obtain, services in a facility that provides reproductive health services, and such an action may be brought under subsection (a)(2) only by a person lawfully exercising or seeking to exercise the First Amendment right of religious

freedom at a place of religious worship or by the entity that owns or operates such place of religious worship.

**(B) Relief.** – In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief and compensatory and punitive damages, as well as the costs of suit and reasonable fees for attorneys and expert witnesses. With respect to compensatory damages, the plaintiff may elect, at any time prior to the rendering of final judgment, to recover, in lieu of actual damages, an award of statutory damages in the amount of $5,000 per violation.

**(2) Action by Attorney General of the United States.** –

**(A) In general.** – If the Attorney General of the United States has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, the Attorney General may commence a civil action in any appropriate United States District Court.

**(B) Relief.** – In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, and compensatory damages to persons aggrieved as described in paragraph (1)(B). The court, to vindicate the public interest, may also assess a civil penalty against each respondent –

**(i)** in an amount not exceeding $10,000 for a nonviolent physical obstruction and $15,000 for other first violations; and

**(ii)** in an amount not exceeding $15,000 for a nonviolent physical obstruction and $25,000 for any other subsequent violation.

**(3) Actions by State Attorneys General. –**

**(A) In general. –** If the Attorney General of a State has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of this section, such Attorney General may commence a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any appropriate United States District Court.

**(B) Relief. –** In any action under subparagraph (A), the court may award appropriate relief, including temporary, preliminary or permanent injunctive relief, compensatory damages, and civil penalties as described in paragraph (2)(B).

**(d) Rules of construction. –** Nothing in this section shall be construed –

**(1)** to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution;

**(2)** to create new remedies for interference with activities protected by the free speech or free exercise clauses of the First Amendment to the Constitution, occurring outside a facility, regardless of the point of view expressed, or to limit any existing legal remedies for such interference;

**(3)** to provide exclusive criminal penalties or civil remedies with respect to the conduct prohibited by this section, or to preempt State or local laws that may provide such penalties or remedies; or

**(4)** to interfere with the enforcement of State or local laws regulating the performance of abortions or other reproductive health services.

**(e) Definitions. – As used in this section:**

**(1) Facility.** – The term "facility" includes a hospital, clinic, physician's office, or other facility that provides reproductive health services, and includes the building or structure in which the facility is located.

**(2) Interfere with.** – The term "interfere with" means to restrict a person's freedom of movement.

**(3) Intimidate.** – The term "intimidate" means to place a person in reasonable apprehension of bodily harm to him- or herself or to another.

**(4) Physical obstruction.** – The term "physical obstruction" means rendering impassable ingress to or egress from a facility that provides reproductive health services or to or from a place of religious worship, or rendering passage to or from such a facility or place of religious worship unreasonably difficult or hazardous.

**(5) Reproductive health services.** – The term "reproductive health services" means reproductive health services provided in a hospital, clinic, physician's office, or other facility, and includes medical, surgical, counseling or referral services relating to the human reproductive

system, including services relating to pregnancy or the termination of a pregnancy.

**(6) State.** – The term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

## COUNTER-STATEMENT OF THE CASE

Appellant, Thomas Sharpe, M.D., proceeding *pro se*, commenced this action on June 15, 1999, in the United States District Court for the Northern District of New York, alleging that the Respondents Johnson Newspaper Corporation, improperly sued as the "Watertown Daily Times," ("Johnson") and Martha Ellen ("Ellen"), and several co-defendants, violated FACE. After Appellant served an amended complaint pursuant to a Decision and Order dated August 6, 1999, Johnson and Ellen moved for summary judgment pursuant to Rule 56. On March 31, 2000, the Hon. Thomas J. McAvoy granted their motion and dismissed Appellant's causes of action against them. This appeal was taken from the Final Judgment entered by the District Court on December 7, 2000, which renewed the Court's prior orders and dismissed Appellant's Amended Complaint in its entirety. The complete procedural history is set forth in the Decision and Order dated March 31, 2000 and the Magistrate Judge's Decision-Order and Report-Recommendation dated March 23, 2000.

Appellant, formerly a licensed physician, had admitting privileges at E. J. Noble Hospital in Gouverneur, New York. He commenced this action alleging that Johnson and Ellen, and several other defendants, violated FACE by

preventing him from providing reproductive health services to pregnant teenage girls and other women. Appellant's Amended Complaint alleged that Johnson and its reporter, Ellen, published articles and engaged in activities that caused confusion and panic amongst pregnant teenage girls and other women, thereby preventing them from receiving reproductive health services. In his Amended Complaint, Appellant alleged that (i) certain articles written by Ellen and published in the Times suggested that pregnant women seek appointment with a physician who was working as Appellant's replacement following his surrender of his license to New York State. He also claimed that other unnamed reporters from the Johnson "stalked" pregnant girls and intercepted or otherwise interfered with their complaints, disrupted a meeting of women seeking reproductive care, an article written by Ellen "worsened the panic," and Johnson failed to warn women that they would not be able to obtain services from a particular physician.

Johnson and Ellen moved for summary judgment on the basis that Appellant had no standing to maintain a cause of action against them under FACE and that their activities both did not constitute a violation of the statute and were, in any event, protected by the First Amendment. On March 31, 2000, the Hon. Thomas J. McAvoy granted their motion for summary judgment. On December 7, 2000, Judge McAvoy resolved additional motions by other parties by dismissing Appellant's complaint as to those remaining defendants, and also issued a Final Judgment that was entered that same day.

On appeal to the Court of Appeals for the Second Circuit, that Court affirmed the decision below (2004 U.S. App. LEXIS 21479 (2d Cir. N.Y., Oct. 15, 2004) as to Johnson and Ellen, stating:

> "We have carefully reviewed Sharpe's contentions on appeal and find them to be without merit. We write only to address the motivation required by the FACE Act. In granting summary judgment for the defendants on December 7, 2000, the district court held that to state a claim under the FACE Act, Sharpe had to allege, inter alia, that the defendants intentionally used force to obstruct access to a reproductive health facility "because the interfered-with person is or has been obtaining or providing reproductive health services, or in order to intimidate such person or any other person or class of persons from obtaining or providing reproductive health services." *Sharpe v. Connole,* 123 F. Supp. 2d 87, 88 (N.D.N.Y. 2000). In so holding, the district court rejected Sharpe's argument that the only intent required to state a claim under the FACE Act was the intent to obstruct and interfere. *Id.* at 89."

The Court of Appeals found it unnecessary to address to Johnson's and Ellen's First Amendment right to gather news and decide whether Appellant's claim that their activities violated FACE passed constitutional muster.

## ARGUMENT

### POINT I

### THE DISTRICT COURT PROPERLY AWARDED SUMMARY JUDGMENT BECAUSE APPELLANT LACKED STANDING TO SUE RESPONDENTS FOR ALLEGED VIOLATION OF 18 U.S.C. § 248 AND BECAUSE THEIR NEWSGATHERING ACTIVITIES WERE PROTECTED BY THE FIRST AMENDMENT.

#### A. Lack of Standing.

Appellant failed to establish that he had the requisite standing to bring a claim against Johnson and Ellen under FACE. He could not establish a causal connection between their alleged conduct and any direct or indirect injury to him that proximately resulted in the violation of any right protected by FACE. His efforts to claim that others had suffered an injury by being confused or "misled" by Respondents' news stories stated no claim by Appellant himself that came within FACE. He does not fall within the "zone of interests" that Congress sought to protect when it enacted the statute.

Moreover, the Court of Appeals correctly concluded that, even if Appellant's factual allegations were true, he had failed to establish a *prima facie* claim under FACE against Respondents Johnson and Ellen because their conduct was not violent, did not threaten harm and did not have the motivation required by FACE to make their conduct actionable. Appellant's complaint did not allege, and he offered no proof below, that the alleged conduct by Johnson and Ellen about which he complained was motivated by a desire to prevent Appellant from providing

reproductive health services or because he was a provider of such services.

Consequently, Appellant had no standing to bring a claim against Respondents under FACE. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *United States v. E. F. Vazquez*, 145 F.3d 74, 80 (2d Cir. 1998); *Pashaian v. Eccelston Prop., Ltd.*, 88 F.3d 77, 82 (2d Cir. 1996). He could not, and did not, demonstrate any causal connection between Johnson's and Ellen's alleged conduct and the harm he claims to have suffered (he actually claimed the harm had been suffered by others, not by him, except to the extent that he allegedly "lost patients"). *See Lujan*, 504 U.S. at 560-61; *E. F. Vazquez*, 145 F.3d at 80; *Pashaian*, 88 F.3d at 82. To establish standing, Appellant had to show that his claim was based on a violation of his individual rights. *See Valley Forge Christian College v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 482-83 (1982). He may not assert the rights of a third party to establish standing, nor may he predicate standing on a generalized grievance or an abstract injury to the rights possessed by every citizen. *See id.* The District Court correctly concluded that Appellant lacked standing to bring claims on behalf of his patients and other women who generally sought reproductive services.

As Appellant's claim could not be based on injuries sustained by others, he had to establish his standing to sue by demonstrating that (i) he had suffered an actual or threatened injury that is concrete and particular; (ii) there was a causal connection between the injury suffered and the allegedly illegal conduct of Johnson and Ellen; and (iii) his injury was likely to be redressed by a favorable decision of the Court. *See Lujan*, 504 U.S. at 560-61; *E. F. Vazquez*, 145 F.3d at 80; *Pashaian*, 88 F.3d at 82.

Even if the Court had accepted as true Appellant's allegations that he suffered a loss of patients, a claim which is defeated by the fact that he voluntarily surrendered his medical license to New York State in 1997, he still failed to present a triable issue as to a causal connection between his purported loss of patients and the alleged conduct by Johnson and Ellen. *See Lujan*, 504 U.S. at 560-61; *E. F. Vazquez*, 145 F.3d at 80.

According to his Amended Complaint, his alleged loss of patients resulted from the collaborative effort of the multiple defendants in this action to force his substitute physician, Dr. K, out of licensing on May 28, 1996. Even if Appellant did lose patients as a result of the actions taken against Dr. K, he does not have standing to maintain an action against Johnson and Ellen because their first allegedly wrongful act occurred on May 30, 1996, two days after Dr. K was allegedly "forced" out of practice. *See Lujan*, 504 U.S. at 560-61; *E. F. Vazquez*, 145 F.3d at 80. Therefore, the Court of Appeals properly affirmed the dismissal of the complaint as regards Johnson and Ellen because the District Court lacked Article III jurisdiction. *See Lujan*, 504 U.S. at 560-61; *E. F. Vazquez*, 145 F.3d at 80; *United States v. 27.09 Acres of Land*, 1 F.3d 107, 111 (2d Cir. 1993) (appellate court has responsibility to satisfy itself that District Court had jurisdiction).

Also, Appellant failed to establish that he fell within the "zone of interests" that Congress sought to protect when it enacted FACE, as he was not a provider of reproductive services at E. J. Noble Hospital during the period in which Johnson and Ellen committed their allegedly wrongful acts. *See Bennett v. Spear*, 520 U.S. 154, 162 (1997); *Lee v. Board of Governors of the Federal Reserve*

*System*, 118 F.3d 905, 912 (2d Cir. 1997). Although Appellant's Amended Complaint does not clearly set forth how Johnson and Ellen interfered with his ability to provide reproductive health services in violation of FACE, the gravamen of his complaint seems to be that the alleged conduct of Johnson and Ellen caused confusion and panic which prevented pregnant women from receiving services at E. J. Noble Hospital. *See* Amended Complaint, ¶ 9 ("the article worsened the panic and led to severe losses to the whole hospital").

Even if the Court were to accept the allegations as true, the alleged wrongful conduct committed by Johnson and Ellen occurred between May 28, 1996 and July 11, 1996, after his admitting privileges at the hospital had been suspended on May 22, 1996. Thus, Appellant was not a provider of reproductive health services at the E. J. Noble Hospital within the meaning of FACE when Johnson and Ellen allegedly committed their allegedly wrongful conduct because he no longer provided assistance to the facility and its staff. *Cf. U.S. v. Dinwiddie*, 76 F.3d 913, 926-27 (8th Cir. 1996), *cert. denied*, 519 U.S. 1043 (1996) (facility maintenance supervisor qualifies as "provider" for purposes of 18 U.S.C. § 248(a)(1) because his assistance is needed for physicians at clinic to do job); *Greenhut v. Hand,* 996 F. Supp. 372, 376 (D.N.J. 1998) (volunteer social worker qualifies as "provider" under FACE because she provides assistance to the facility's staff).

**B. Lack of Proof of Required Motivation.**

Appellant neither alleged nor offered proof below that Johnson or Ellen acted with the necessary intent to

commit a violation of FACE. *See* 18 U.S.C. § 248(a)(1); *United States v. Wilson*, 154 F.3d 658, 664 (7th Cir. 1998), *cert. denied*, 525 U.S. 1081 (1999); *Dinwiddie*, 76 F.3d at 923.

The Court of Appeals found Appellant's contentions to be "without merit." The Court of Appeals undoubtedly agreed with the District Court that, as against Johnson and Ellen, the Amended Complaint failed to allege that they used force, threat of force, or physical obstruction to either intentionally injure, intimidate, or interfere with Appellant's activities because he provided reproductive health service. *See* 28 U.S.C. § 248(a); *Planned Parenthood of the Columbia/Williamette, Inc. v. American Coalition of Live Activists (ACLA)*, 290 F.3d 1058 (9th Cir. 2001), *cert. denied*, 539 U.S. 958 (2003); *Lucero v. Trosch*, 928 F. Supp. 1124, 1130-31 (S.D.Ala. 1996).

In his Amended Complaint, Appellant alleges that: (i) articles published in the Johnson, written by Ellen, "suggested that pregnant women seek appointment [sic] with Dr. K. A well-timed move to break any resilience in these women. The immediate consequence was the death of Baby I . . . ," (ii) reporters from the Johnson "stalked" pregnant adolescent girls and intercepted or otherwise interfered with their complaint, (iii) Ellen disrupted a meeting of women seeking reproductive care and "with her continuous presence [and] continuous stalking effectively prevented these women from taking any action to regain their reproductive care, (iv) an article written by Ellen "worsened the panic and led to severe losses to the whole hospital," (v) Johnson "failed to warn pregnant women that they won't be able to obtain services from Mroz even

in emergency," and that (vi) "the confusion led to the death of another baby . . . the same kind of confusion the Johnson created amongst these girls a year before." Even accepting all of these allegations as true, the conduct of Johnson and Ellen does not constitute the type of violent or threatening behavior that is prohibited under FACE. *See Planned Parenthood, supra,* at p. 1074, FN.7, p. 1079, FN.14; *Lucero*, 928 F. Supp. at 1130-31.

Accordingly, even if Appellant's allegations regarding Johnson and Ellen were accepted as true, that alleged conduct did not violate FACE since none of their alleged conduct or speech can reasonably be interpreted as threatening violence. *See id.*; *cf. Dinwiddie*, 76 F.3d at 925 (finding violation of FACE where protester made threats of force that intimidated a physician by placing him in reasonable apprehension of bodily harm). Consequently, since the alleged conduct of Johnson and Ellen is not prohibited under FACE, Appellant's Amended Complaint fails to establish a *prima facie* cause of action under FACE against them. *See Planned Parenthood v. ACLA, supra,* at p. 1074, FN.7, p. 1079, FN.14; *Lucero,* 928 F. Supp. at 1130-31.

## CONCLUSION

Respondents Johnson Newspaper Corporation and Martha Ellen respectfully submit that the Petition herein should be denied.

Respectfully submitted,

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